

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)	NOTICE OF PUBLIC HEARING ON
17.56.101, 17.56.102, 17.56.308,)	PROPOSED AMENDMENT
17.56.309, 17.56.310, 17.56.701,)	
17.56.815, 17.56.903, and 17.56.1001)	(UNDERGROUND STORAGE
pertaining to underground storage tanks)	TANKS)

TO: All Concerned Persons

1. On March 9, 2006, at 10:30 a.m., the Department of Environmental Quality will hold a public hearing in Room 35 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Department no later than 5:00 p.m., February 27, 2006, to advise us of the nature of the accommodation that you need. Please contact Robert A. Martin, Waste and Underground Tank Management Bureau, Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-4194; fax (406) 444-1374; or email rmartin@mt.gov.

3. The rules proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

17.56.101 DEFINITIONS For the purposes of this chapter and unless otherwise provided, the following terms have the meanings given to them in this rule and shall be used in conjunction with those definitions in 75-11-503, MCA.

(1) through (40) remain the same.

(41) "Oil/water separator" means a flow-through tank designed to separate petroleum from water. The term does not include piping or tanks that contain petroleum effluent.

(41) through (43) remain the same, but are renumbered (42) through (44).

(45) "Out of service" means that the normal operation of the UST system is discontinued as characterized by the fact that no regulated substances are being deposited into or drawn from the system, and:

(a) leak detection or leak prevention procedures are not conducted in a manner normally associated with an in-service system of a similar type and purpose;
or

(b) for emergency generator tanks, used oil tanks, heating oil tanks, or hazardous substance tanks, the infrequent use of the UST system cannot be justified as part of its purpose.

(44) remains the same, but is renumbered (46).

~~(45)~~ (47) "Owner" means:

~~(a) in the case of an UST system in use on November 8, 1984, or brought into use after that date, any person who owns an UST system used for storage, use, or dispensing of regulated substances; and for purposes of administration of Title 75, chapter 11, part 2, MCA, the term as defined in 75-11-203, MCA;~~

~~(b) in the case of any UST system in use before November 8, 1984, but no longer in use on that date, any person who owned such UST immediately before the discontinuation of its use; for purposes of administration of Title 75, chapter 11, part 3, MCA, the term as defined in 75-11-302, MCA; and~~

~~(c) unless otherwise provided in statute or rule, for purposes of administration of Title 75, chapter 11, part 5, MCA, any person who:~~

~~(i) holds title to, controls, or possesses an interest in an UST system; or~~

~~(ii) owns the property on which an UST system is located. The term does not include a person who holds an interest in a storage tank solely for financial security, unless through foreclosure or other related actions the holder of a security interest has taken possession of the tank.~~

~~(46) through (60) remain the same, but are renumbered (48) through (62).~~

~~(63) "Significant noncompliance" means the existence of one or more violations that:~~

~~(a) cause, or may cause, a substantial, continuing risk to public health and the environment;~~

~~(b) substantially deviate from a requirement of this chapter; or~~

~~(c) include failure to install, maintain, or operate equipment essential to preventing or detecting leaks.~~

~~(61) through (69) remain the same, but are renumbered (64) through (72).~~

AUTH: 75-11-204, 75-11-319, 75-11-505, MCA

IMP: 75-11-203, 75-11-302, 75-11-319, 75-11-505, MCA

REASON: The proposed addition of ARM 17.56.101(41) is necessary to implement the exemption for oil/water separators that is proposed in the amendments to ARM 17.56.102(3)(g), below. This definition will allow the Department to adopt rules applicable to these specific USTs.

The proposed addition of (45) is necessary because earlier rule changes replaced "temporary closure" with "inactive status" and added the condition that the owner/operator must notify the department to place UST systems into inactive status. There remains a category of tanks that are not being operated but that have not been reported to the department as inactive. This definition will allow the department to adopt rules for maintenance and closure relative to that category of tanks.

The proposed addition of (47) is necessary because the rules, to which this definition applies, implement Title 75, chapter 11, parts 2, 3, and 5, MCA. Parts 2 and 3 contain definitions of the term that are referenced in the proposed amendments. Part 5 contains no definition of the term. The proposed definition, which is the definition in 75-11-302, MCA, applicable to part 3, defines the term in accordance with the plain meaning of the term under general property law, under which an owner is a person who has ownership of, dominion over, or title to property. It incorporates the law of fixtures under which the owner of real property to

which a fixture is attached is owner of the fixture unless ownership is reserved by another person. The Department proposes to substitute this definition for the current definition because the current definition conflicts with the definitions contained in 75-11-203 and 75-11-302, MCA. The Department proposes to amend the definition to implement the intent of the Legislature. The current definition, which comes from federal regulations, excludes persons who currently own tanks that have not been used since November 7, 1984. Neither the language of Title 75, chapter 11, part 5, nor the legislative history of that Act, indicate that the Legislature intended that the term be given this narrower meaning. In the absence of express language or legislative intent to the contrary, case law on statutory interpretation indicates that terms are to be given their commonly accepted or plain meaning.

The proposed addition of (63) is necessary to establish a definition of "significant noncompliance", as the phrase is used in 75-11-509(9), MCA.

17.56.102 APPLICABILITY (1) through (2)(b) remain the same.

(3) Subchapters 2, 3, 4, 7, 8, 9, 10, 13, and 14 do not apply to any of the following types of PSTs and UST systems:

(a) through (d) remain the same.

(e) an aboveground storage tank with a capacity less than 30,000 gallons; ~~or~~

(f) aboveground pipes associated with tanks under (3)(d) ~~and~~ or (e), except that pipelines regulated under the following laws are excluded:

(i) remains the same.

(ii) state law comparable to the provisions of law referred to in ~~(4)(3)(f)(i)~~, if the facility is intrastate; or

(g) oil/water separators.

(4) through (6) remain the same.

AUTH: 75-11-319, 75-11-505, MCA

IMP: 75-11-319, 75-11-505, MCA

REASON: The proposed amendment to ARM 17.56.102(3)(f)(ii) is necessary to correct an internal reference. Proposed new (3)(g) is necessary because oil/water separators are USTs by definition, but in isolation, they neither pose a significant environmental risk nor lend themselves to application of leak prevention or leak detection requirements.

17.56.308 OPERATING PERMIT REQUIRED (1) After March 31, 2003, except as provided in (9), a person may not place a regulated substance in, dispense a regulated substance from, or otherwise operate an underground storage tank system unless the owner or operator has a valid operating permit ~~and an operating tag~~ for the system.

(2) The department shall issue an operating permit when the owner or operator has filed with the department an inspection report signed by a licensed compliance inspector and the department determines, on the basis of the inspection report and other relevant information, that the operation and maintenance of the underground storage tank systems at that facility are not in significant noncompliance with Title 75, chapter 11, part 5, MCA, ~~and the~~ or rules adopted

thereunder, on the date of the inspection. The department may issue and renew permits for tanks that are in significant noncompliance with applicable requirements. The department may take enforcement actions, including actions for penalties, and may pursue any other remedy available to the department to address noncompliance with statutes, rules, permits, or orders issued pursuant to this chapter.

(3) remains the same.

(4) An operating permit must be issued for three years and ~~is renewable upon demonstration that the underground storage tank system is in compliance with Title 75, chapter 11, part 5, MCA, and the rules adopted thereunder.~~

(5) ~~The department shall issue an operating tag for each underground storage tank for which the department has issued an operating permit as described in (2) and (4). The operating tag must be visibly affixed by the owner or operator to each tank's fill pipe or to another visible part of the tank if affixing the tag to the fill pipe is impracticable. If an operating permit expires or is revoked, the owner or operator must remove each operating tag and return it to the department within 30 days of receipt of expiration or revocation. Operating permits must be kept legible and must be posted in a place that is visible to delivery personnel whenever petroleum deliveries are conducted.~~

(6) ~~The department may suspend, or revoke, or determine not to renew an operating permit and tag issued under this rule upon its finding that there is substantial evidence that:~~

(a) ~~the underground storage tank system for which the permit was issued is no longer in compliance with operation and maintenance requirements set out in ARM 17.56.309(1)(a) in significant noncompliance with Title 75, chapter 11, part 5, MCA, or with rules, permits or orders issued pursuant to Title 75, chapter 11, part 5, MCA;~~

(b) and (c) remain the same.

(7) ~~Except as provided in (8), the department shall suspend or revoke an operating permit and tag issued under this rule according to the provisions of 75-11-512, MCA.~~

(8) ~~If the department determines that noncompliance with Title 75, chapter 11, part 5, MCA, or the rules adopted thereunder, poses an immediate or substantial threat to the public health, safety, or environment, it may immediately revoke the operating permit and tag. A permittee whose operating permit and tag have has been revoked in accordance with this rule may request a hearing before the department. The department shall schedule a hearing within 10 days of the request for hearing.~~

(9) For the first 45 days after an operating permit expires, an UST is considered not operating if no regulated substance is deposited into or dispensed from the system.

AUTH: 75-11-505, MCA

IMP: 75-11-509, MCA

REASON: The proposed amendments to ARM 17.56.308(1) and (5) through (8) eliminate operating tag requirements. The Department believes that tags are an

ineffective way to communicate authorization to deposit fuel to distributors. Tags are difficult to see because their typical location near spill buckets covers them with dirt and because of darkness during after-hours delivery. Delivery drivers often do not check for tags because they do not expect tank owners to have current tags in place, and because it is cumbersome to locate the tags. The Department believes that the new permit display requirement in (5) will be more effective and will be sufficient to communicate fill authorization.

The proposed amendments to (2) and (6) are necessary because House Bill 78 (2005) revised 75-11-509, MCA, by eliminating mandatory, formal enforcement, concurrent with issuance or renewal of a permit for significant noncompliance with tank operation and maintenance requirements. The proposed revisions to (2) reflect the statutory changes. The Department has implemented enforcement measures to ensure that a facility will come into compliance within the earliest practicable time or face formal enforcement. Full compliance is not a reasonable measure for issuing an operating permit. The Department's determination to not renew an operating permit may substantially impact operation of an entire business. The Department recognizes the magnitude of such a determination and, in general, anticipates taking such an action only when an inspection has not been conducted or when a potential imminent risk to the environment or human health is evident.

The proposed addition of new (9) is necessary to allow temporary storage of product in tanks while an operating permit is being renewed. Under the existing rules, an UST is considered to be in operation if it is storing a regulated substance. ARM 17.56.308 prohibits storage without an operating permit. However, when an operating permit expires, a facility is generally closed only for a few days, if at all, until the owner can satisfy requirements for issuance of a new operating permit. It is not reasonable to require the facility to empty its tanks for this short period of time and then have to refill them.

17.56.309 REQUIREMENTS FOR COMPLIANCE INSPECTIONS

(1) The owner or operator of an underground storage tank system shall have all active underground storage tank systems at an individual facility inspected by a licensed compliance inspector, certified under this chapter, at least every three years for compliance with the operation and maintenance requirements of Title 75, chapter 11, part 5, MCA, and the rules adopted thereunder.

(a) through (a)(iv) remain the same.

~~(b) If the department determines that a tank is not in full compliance with the requirements in the operation and maintenance categories in (1)(a), the department may issue or renew an operating permit under ARM 17.56.308 only if the department requires, in a compliance order issued pursuant to 75-11-512 or 75-11-525, MCA, that the noncompliance be corrected at the earliest practicable time. The department may also take other enforcement actions, and may pursue any other remedy available to the department, to address the noncompliance.~~

~~(c) The inspection may assess compliance with requirements in categories other than those listed in (1)(a). If the department determines that there is a violation in a category other than those listed in (1)(a), the department may issue or renew an operating permit and may pursue enforcement action to address the violation.~~

(d) remains the same, but is renumbered (b).

(2) through (4) remain the same.

(5) No later than ~~40~~ 15 days after any inspection conducted pursuant to this rule, the owner or operator, or the compliance inspector, ~~acting on behalf of the owner or operator~~, shall provide to the department the results of the compliance inspection on a form approved by the department. The form must be signed by the licensed compliance inspector and the underground storage tank system owner or operator.

(6) remains the same.

(7) The owner or operator shall correct the all violations noted in a compliance inspection report as follows:

~~(a) leak detection violations must be corrected within 60 days of receipt of the inspection report by the owner or operator; and~~

~~(b) all other violations must be corrected~~ either within 90 days of receipt of the inspection report by the owner or operator, or at least 14 days prior to the expiration of the facility's operating permit, whichever occurs first.

(8) The owner or operator shall ~~obtain~~ submit to the department a follow-up inspection report either within 30 days of after completion of the corrective actions required under (7)(a) and (b), or at least 14 days before the expiration of the facility's operating permit, whichever occurs first.

AUTH: 75-11-505, 75-11-509, MCA

IMP: 75-11-509, MCA

REASON: The proposed deletion of ARM 17.56.309(1)(b) and (c) is necessary because HB 78 (2005) revised 75-11-509, MCA, by eliminating mandatory formal enforcement on all violations, concurrent with issuance of an operating permit for noncompliant UST systems, without regard to significance of the violations. The proposed amendments reflect the statutory changes and their impacts on the rule.

The proposed revisions to (5) are necessary because the Department has received comments that the 10-day window is too short for inspectors and owners/operators to coordinate signing the inspection review forms and submitting them to the Department. The proposed revisions address these comments by adding five days, which allows inspectors and owners/operators more time while ensuring timely submittal. The requirement that the inspector act "on behalf of the owner or operator" is proposed to be deleted because it is unnecessary.

The proposed deletion of (7)(a) and the amendment of (b) are necessary to provide one compliance deadline for a given inspection. This simplifies corrective action and relieves administrative burdens and confusion caused by multiple corrective action deadlines. The proposed amendments to (7) and (8) would be amended to require the owner or operator to complete corrective action and submit documentation to the Department such that the Department has enough time to issue an operating permit. This documentation is necessary for the Department to determine whether there are outstanding noncompliance issues when it issues an operating permit.

17.56.310 CONDITIONAL, ONE-TIME FILL AND EMERGENCY

OPERATING PERMITS (1) For an underground storage tank system installed after December 31, 2001, the department shall issue a conditional operating permit ~~and tag~~ upon the submission of all documentation required by ARM 17.56.1305, related to the installation of that underground storage tank system.

(2) remains the same.

(3) A conditional operating permit ~~and tag~~ issued under (1) or (2) expires 180 days after issuance.

(4) through (5)(b) remain the same.

(6) The department may issue an emergency operating permit to allow operation of an UST without a valid operating permit ~~and tag~~ when operation of the UST is necessary to protect the safety and welfare of persons, property, or national security from imminent harm or threat of harm.

(a) through (d) remain the same.

AUTH: 75-11-505, 75-11-509, MCA

IMP: 75-11-509, 75-11-505, MCA

REASON: The proposed amendments to ARM 17.56.310 are necessary because the operating tag requirement is proposed to be eliminated. See the Reason for the proposed amendments to ARM 17.56.308, above.

17.56.701 INACTIVE AND OUT OF SERVICE UST SYSTEMS (1) remains the same.

(2) When an UST system is inactive or out of service for three months or more, owners and operators shall also:

(a) through (c) remain the same.

(3) Out of service UST system components that do not meet the corrosion protection requirements of ARM 17.56.201 or 17.56.202 must, within 12 months of being taken out of service or, in the case of a found tank, within 12 months of its discovery, be:

(a) permanently closed in accordance with ARM 17.56.702 through 17.56.705 17.56.706; or

(b) brought into compliance with ARM Title 17, chapter 56, subchapter 2.

(4) through (4)(e)(ii) remain the same.

AUTH: 75-11-505, 75-11-509, MCA

IMP: 75-11-505, 75-11-509, MCA

REASON: Previous rule changes replaced "temporarily closed" with "inactive" and added the condition that, for a tank system to be inactive, the owner/operator must notify the Department of the inactive status of the UST system. However, the same closure requirements should apply to an out of service tank whether or not the owner has notified the Department of the inactive status. The proposed revision to ARM 17.56.701(2) is necessary to apply the same closure requirements to inactive and out of service tanks.

The revisions to (3) would clarify that the Department does not intend to require owner/operators to close out of service tanks that they wish to upgrade within a year. ARM 17.56.706 is not referenced in the current rule because it was added later. The Department proposes to reference ARM 17.56.706 now because it contains closure requirements. A 12-month timeframe, which is based on federal regulations, would be included to facilitate enforcement of this rule.

17.56.815 MONTANA PETROLEUM TANK RELEASE CLEANUP FUND

(1) remains the same.

(2) If an owner or operator applies the petroleum tank release cleanup fund as partial satisfaction of the coverage requirements of ARM 17.56.805, the owner or operator may satisfy the remaining portion of the required coverage by certifying a tangible net worth equal to that amount.

(3) Certification of tangible net worth must be based on year-end financial statements for the latest completed calendar year and documented on a form approved by the department.

AUTH: ~~75-10-405~~, 75-11-505, MCA

IMP: ~~75-10-405~~, 75-11-505, MCA

REASON: Because upgrade requirements, third-party inspections, and market forces have driven many fueling facilities out of business, the Department does not wish to burden facilities more than necessary in meeting financial responsibility requirements. Therefore, the Department is proposing that the owner or operator may satisfy the remaining portion of financial responsibility coverage, not covered by the petroleum tank release cleanup fund, by certifying a tangible net worth equal to that amount.

The proposed amendments to ARM 17.56.815 are permissible because EPA has approved Montana's Petroleum Tank Release Cleanup Fund as a "partial coverage fund" for demonstrating financial responsibility by UST owners.

The EPA publication, "Financial Responsibility for Underground Storage Tanks, A Reference Manual", EPA 51-B-00-003, (January 2000), states: "To help owners and operators comply with deductible requirements, EPA allows states to establish their own financial tests of self insurance for deductible amounts."

17.56.903 CHANGE IN OWNERSHIP (1) The purchaser ~~and seller~~ of an UST system shall ~~each~~ provide written notification to the department within 30 days after any sale. ~~Such notification must be made by both parties signing and submitting a form provided by the department.~~

(2) and (3) remain the same.

AUTH: 75-11-505, MCA

IMP: 75-11-505, MCA

REASON: The proposed amendments to ARM 17.56.903(1) are necessary because, when the Department has accepted a notification form from a new owner

taking responsibility for the tank systems, it is burdensome and unnecessary to require paperwork from a then disinterested party.

17.56.1001 TANK FEE SCHEDULE (1) Owners or operators of underground storage tanks which have not been closed in accordance with ARM 17.56.702 shall pay an annual registration fee ~~to the department~~ for each underground storage tank owned or operated. In order to schedule annual renewal dates, the department may prorate the registration fee to cover registration periods not equal to 12 months.

(2) through (3) remain the same.

~~(4) Upon receipt of the appropriate registration fee, the department shall issue a facility registration certificate listing each underground storage tank for which the fee was paid.~~

~~(5) The department shall issue a replacement registration certificate to an owner or operator after submission of satisfactory evidence that the certificate has been lost or destroyed.~~

AUTH: 75-11-505, MCA

IMP: 75-11-505, MCA

REASON: The proposed amendments to ARM 17.56.1001(1) and deletion of (4) and (5) are necessary because the Department no longer collects fees. This function is served by the "One-stop Licensing" program in the Department of Revenue. They send a registration certificate when fees are paid. The requirements in the rule now are superfluous.

4. Concerned persons may submit their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Robert A. Martin, Waste and Underground Tank Management Bureau, Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-4194; fax (406) 444-1374; or email rmartin@mt.gov, no later than March 16, 2006. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. James Madden, attorney, has been designated to preside over and conduct the hearing.

6. The Department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list must make a written request that includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supplies; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA;

underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Such written request may be mailed or delivered to Elois Johnson, Paralegal, Legal Unit, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, emailed to ejohnson@mt.gov or may be made by completing a request form at any rules hearing held by the Department.

7. The bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled.

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL
QUALITY

/s/ James M. Madden
JAMES M. MADDEN
Rule Reviewer

BY: /s/ Richard H. Oppen
RICHARD H. OPPEN, Director

Certified to the Secretary of State, January 13, 2006.